

1 UNITED STATES DISTRICT COURT
2 NORTHERN DISTRICT OF CALIFORNIA
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5 IN RE: ONLINE DVD RENTAL
6 ANTITRUST LITIGATION

MDL No. M 09-2029 PJH

PRETRIAL ORDER NO. 4

7 This document relates to:
8 All Actions
9

10 **PRETRIAL SCHEDULE**

11 **Pleadings**

12 1. Defendants shall answer the Netflix consolidated amended complaint by
13 July 13, 2009.

14 2. Plaintiffs shall file the consolidated amended complaint in the Blockbuster
15 cases by July 23, 2009.

16 3. Defendant shall file a motion to dismiss the Blockbuster consolidated
17 amended complaint within two days of the filing of the complaint. The opposition shall be
18 filed by August 7, 2009; replies by August 14, 2009. The hearing will occur on September
19 2, 2009 at 9:00 a.m.

20 4. Until the court rules on the motion to dismiss, the Blockbuster cases remain
21 on the same discovery track as the Netflix cases. After the court's ruling, a further case
22 management conference can be convened if necessary to discuss consolidation and/or
23 coordination of those cases.

24 **Discovery**

25 1. Discovery shall commence and initial disclosures shall be made on July 20,
26 2009.

27 2. Fact discovery cutoff date is October 20, 2010.

28 3. Expert disclosures shall be made on or before January 7, 2011.

4. Responsive expert disclosures shall be made on or before February 16, 2011.

5. Rebuttal expert disclosures shall be made on or before March 18, 2011.

6. Expert discovery cutoff date is April 4, 2011.

7. Each side may take 35 fact depositions. Any request to vary the federal rule limitations on the length of depositions must be preceded by a meet and confer and if not resolved may be made by informal joint letter to the court.

8. Discovery disputes and management is referred to Magistrate Judge Spero.

Motions

1. Plaintiffs' motion for class certification shall be filed by February 19, 2010. Oppositions shall be filed by April 20, 2010; replies by June 4, 2010. The hearing will occur on August 4, 2010, at 9:00 a.m.

2. At least 60 days in advance of the filing deadline, defendants shall file an administrative motion for leave to file an early motion for partial summary judgment. If the request is granted, the motion for summary judgment shall be briefed and heard on the same schedule as the motion for class certification.

3. Dispositive motions following the close of discovery shall be filed on April 27, 2011. Oppositions shall be filed June 8, 2011; replies by July 13, 2011. The hearing will occur on August 31, 2011, at 9:00 a.m.

4. Any Daubert motions shall be briefed and heard on the same schedule as the dispositive motions.

5. The final pretrial conference will take place on December 15, 2011, at 1:30 p.m.

6. Jury trial shall commence January 23, 2012 at 8:30 a.m., and shall last no longer than 16 trial days.

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PRETRIAL INSTRUCTIONS

A. PRETRIAL MOTIONS

1. All dispositive motions are heard **no later than 120 days before trial**, unless leave of court is obtained for another deadline.

2. Only **one** summary judgment motion may be filed by each side, absent leave of court. Leave of court may be sought if multiple parties comprise one or both sides. Leave of court may be obtained by filing a motion for administrative relief pursuant to Civ. L. R. 7-11, or by requesting a case management conference or informal telephone conference.

3. **Separate** statements of undisputed facts in support of or in opposition to motions for summary judgment shall NOT be filed. See Civil L. R. 56-2. The parties may file a truly **joint** statement of undisputed facts only if all parties agree that the facts are undisputed.

4. The notice and memorandum in support of all **motions** shall be contained in one document.

5. Each party filing or opposing a motion shall also serve and file a **proposed order** which sets forth the relief or action sought and a short statement of the rationale of decision, including citation of authority that the party requests the court to adopt.

6. **Chambers copies** of each electronically-filed document must include on each page the running header created by the ECF system and must be delivered to the Clerk's Office by noon the day following its filing.

7. **Footnotes** in briefs appearing in smaller than the 12-point font required for the text, will be stricken, see Civil L. R. 3-4(c)(2), as will footnotes that are so numerous as to be clearly designed to defeat the page limits found at Civil L. R. 7-2 - 7-4.

8. Motions pursuant to **Daubert v. Merrill Dow Pharmaceuticals, Inc.**, 509 U.S. 579 (1993), challenging the reliability of expert testimony, may be noticed for hearing on the date dispositive motions will be heard or on any available hearing date up to and including the date of the final pretrial conference. Irrespective of the hearing date, the briefs shall be filed in accordance with Civil L. R. 7-2 - 7-5, on a 35-day briefing schedule.

9. Briefing schedules for motions that are specifically set by the court may not be altered by stipulation; rather the parties must obtain leave of court.

10. **Motions *in limine*** are limited to motions to exclude specific items of evidence on a ground and upon such authority as would be sufficient to sustain an objection to such evidence at trial. The court will not generally consider a motion presenting a purely legal issue in the guise of a motion *in limine*.

11. **Discovery motions** will be referred to a Magistrate Judge for resolution. The words "Discovery Matter" shall appear in the caption of all documents relating to discovery to insure proper routing.

12. **Confidential and/or sealed documents** shall be handled in accordance with this court's standing order and Civil L.R. 79-5, both of which the parties shall consult before moving for a protective order or requesting a sealing order. Requests to seal documents used in conjunction with dispositive motions are rarely granted and then only upon a showing of the most compelling of reasons.

1 B. FINAL PRETRIAL CONFERENCE

2 1. Each party shall attend personally or by counsel who will try the case.

3 2. **Not less than forty (40) calendar days** prior to the pretrial conference, all
4 counsel and/or parties shall meet and confer regarding preparation of the joint pretrial
statement.

5 3. **Not less than thirty (30) calendar days** prior to the pretrial conference, counsel
and/or parties shall:

6 a. Serve and file a **joint** pretrial statement. (Separately filed statements
7 will not be accepted by the court and monetary sanctions will be
8 imposed upon the party failing to cooperate in the preparation of a joint
statement).
The pretrial statement shall include the following:

- 9 (i) A brief description of the substance of the claims and defenses
10 which remain to be decided.
11 (ii) A detailed statement of all relief sought, itemizing all elements of
damages claimed.
12 (iii) A statement of all relevant undisputed facts to which the parties
will stipulate for incorporation into the trial record without the
necessity of supporting testimony or exhibits.
13 (iv) A statement of all relevant disputed facts which remain to be
decided.
14 (v) A statement of stipulations requested or proposed.
15 (vi) A brief statement of disputed points of law concerning liability
and relief. Legal argument on these points shall be reserved for
the trial briefs.
16 (vii) A statement of whether bifurcation or a separate trial of specific
issues is feasible and desired.
17 (viii) A statement summarizing the status of settlement negotiations
and indicating whether further negotiations are likely to be
18 productive.

19 b. Serve and file trial briefs (not to exceed 25 pages), which shall specify
each cause of action and defense remaining to be tried along with a
20 statement of the applicable legal standard (no opposition shall be
filed);

21 c. Serve and file no more than ten motions *in limine*, which shall be filed
22 in one document not to exceed 25 pages;

23 d. Serve and file a list of deposition excerpts for witnesses who will not
testify in person, (specifying the witness, page and line references) and
24 other discovery responses that will be offered at trial;

25 e. Serve and file a list of all witnesses to be called at trial, in person or by
deposition, other than solely for impeachment or rebuttal, with a brief
26 statement describing the substance of the testimony to be given;

27 f. Serve and file a numerical list of exhibits that will be offered as evidence
in a party's case in chief in support of a claim or defense, with a brief
28 statement describing the substance and purpose of each exhibit and
the name of the sponsoring witness;

- 1 g. Exchange exhibits which shall be premarked with an exhibit sticker
2 (example attached), tabbed and in binders. Plaintiff shall use numbers
3 (1, 2, 3, etc.) and defendant shall use numbers preceded by a letter (A-
4 1, A-2, A-3, etc.). Additional parties shall also use a letter preceding
5 numbers (B-1, B-2, B-3, or C-1, C-2, C-3, etc.).
- 6 h. Submit two sets for jury trials and three sets for court trials of all
7 premarked exhibits to the Clerk's Office (exhibits are not filed);
- 8 i. Serve and file any request regarding the treatment of confidential or
9 sealed documents.
- 10 j. Serve and file proposed joint voir dire questions and joint jury
11 instructions for cases to be tried by jury;
- 12 k. Serve and file proposed findings of fact and conclusions of law for
13 cases
14 or claims to be tried by the court.
- 15 l. Serve and file a proposed verdict form which contains no reference to
16 submitting party.

17 4. No party shall be permitted to call any witness or offer any exhibit in its case in
18 chief that is not disclosed in these pretrial filings without leave of court and for good cause.

19 5. **Not less than fifteen (15) calendar days** prior to the pretrial conference, counsel
20 and/or parties shall serve and file any opposition to a motion *in limine*. No replies shall be
21 filed. All motions shall be heard at the pretrial conference unless otherwise ordered. The
22 parties shall not file separate objections, apart from those contained in the motions *in limine*,
23 to the opposing party's witness list, exhibit list or discovery designations.

24 C. JURY TRIAL

25 Jury Selection shall proceed as follows: The Jury Commissioner will summon 20 to
26 25 prospective jurors. The Courtroom Deputy will select their names at random and seat
27 them in the courtroom in the order in which their names are called. Voir dire will be
28 conducted of sufficient venire members so that six to eight will remain after all peremptory
challenges and an anticipated number of hardship dismissals and cause challenges have
been made.

The court will then take cause challenges and discuss hardship claims at side bar.
The court will inform counsel which hardship claims and cause challenges will be granted,
but will not announce those dismissals until the selection process is completed. Peremptory
challenges will be made in writing. The court will strike at one time those with meritorious
hardship claims, those excused for cause, and those challenged peremptorily, and then seat
the first six to eight people remaining in numerical order.

The attached voir dire questionnaire shall be given to the venire members and
copies of the responses will be made available to counsel at the beginning of voir dire.
Counsel shall submit a **joint set** of additional voir dire questions to be posed by the court.
Any voir dire questions on which counsel cannot agree may be submitted separately.
Counsel will be permitted brief follow-up voir dire after the court's questioning.

1 The following jury instructions from the Ninth Circuit Manual of Model Jury
2 Instructions Civil (2007 Edition) shall be given absent objection: 1.0 - 1.4, 1.6 - 1.14, 1.18 -
3 1.19, 3.1 - 3.4. Counsel shall submit a **joint set** of case specific instructions using the Ninth
4 Circuit Manual where appropriate. Do not submit duplicates of those instructions listed
5 above. Any instructions on which counsel cannot agree may be submitted separately. Each
6 instruction shall be typed in full on a separate page with citations to the authority upon which
7 it is based **and** a reference to the party submitting it. A second blind copy of each
8 instruction shall also be submitted omitting the citation to authority and the reference to the
9 submitting party, but retaining the title of the instruction.

10 D. TRIAL SCHEDULE

11 The court's trial schedule is 8:30 a.m. to 1:30 p.m. with two fifteen-minute breaks, on
12 Monday, Tuesday, Thursday and Friday.

13 E. PROCEDURE FOR AMENDING THIS ORDER

14 No provision of this order may be changed except by written order of this court upon
15 its own motion or upon motion of one or more parties made pursuant to Civil. L. R. 7-11 with
16 a showing of good cause. Parties may file a formal brief, but a letter brief will suffice. The
17 requesting party shall serve the opposing party on the same day the motion is filed and the
18 opposing party shall submit a response as soon as possible but no later than three days
19 after service.

20 If the modification sought is an extension of a deadline contained herein, the motion
21 must be brought before expiration of that deadline. **The parties may not modify the**
22 **pretrial schedule by stipulation.** A conflict with a court date set after the date of this order
23 does not constitute good cause. The parties are advised that if they stipulate to a change in
24 the discovery schedule, they do so at their own risk. The only discovery schedule that the
25 court will enforce is the one set in this order.

26 IT IS SO ORDERED.

27 Dated: July 13, 2009



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PHYLLIS J. HAMILTON
United States District Judge

CONFIDENTIAL

JUROR QUESTIONNAIRE

Please fill out this form as completely as possible and print clearly. This will assist the judge and the lawyers in selecting a jury and will save time for them and for you. Because copies will be made for the attorneys and the judge, do not write on the back of any page. If you need more room, continue at the bottom of the page. Thank you for your cooperation.

1. Your name: _____

2. Your age: _____

3. City in which you reside: _____

4. If you have lived there for fewer than five years, where did you live before:

5. Your place of birth: _____

6. Your marital status: (circle one)

single married separated divorced widowed

7. What is your occupation and how long have you worked in it? (If you are retired, please describe your main occupation when you were working).

8. Who is (or was) your employer? _____

9. If you have held this job for fewer than five years, describe your previous job:

10. If you are married, please list your spouse's occupation.

11. If you have children, please list their ages and genders and, if they are employed, please give their occupations.

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12. Please describe your education background:

Highest grade completed: _____

College and/or vocational schools you have attended:

Major areas of study: _____

13. Have you served in the military? _____

14. Have you ever had jury experience? _____ No. of times? _____

If yes: State/County Court _____ Federal Court _____

When? _____

Was it a civil or criminal case? _____

Did any of the juries reach a verdict? _____

Nichole Heuerman, Deputy Clerk
